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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 192

WILLIS E. GIESE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

EDMUND D. CAMPBELL,
Counsel for Petitioner.

DOUGLAS, OBEAR & CAMPBELL,
Of Counsel.

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The petitioner Willis E. Giese prays that a writ of certiorari issue to review a judgment convicting petitioner of a violation of Section 11 of the Selective Training and Service Act of 1940,[1] which judgment was entered against the petitioner by the United States Court of Appeals for the District of Columbia in the above case on June 19, 1944.

Opinions Below.

The oral opinion of the District Court (not reported) is found on page 19 of the Record. The opinion of the United States Court of Appeals (not yet officially reported), is found in the Record at page 22.

[1] *Act of September 16, 1940,* 54 Stat. 894, 50 U. S. C. A., Sec. 311.

Basis of Jurisdiction.

This Court has authority to review the conviction of petitioner under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. Sec. 347).

Questions Presented.

1. Whether under the Selective Training and Service Act of 1940 (prior to the amendment of December 3, 1943), and the regulations adopted pursuant thereto, appeals to the President from draft board classifications must be heard and determined by civilian citizens of the United States rather than by officers of the United States Army and Navy on active duty.

2. Whether question 1 may be raised as a defense to an indictment of petitioner for failure to obey an order to report for induction which was based on a "Presidential appeal" classification made and determined by Army and Naval officers on active duty and not by civilian citizens.

Statement of Facts.[2]

> "Appellant [petitioner] was indicted and found guilty of a violation of the Selective Service Act of 1940. On the 16th of October, 1940, he registered in the District of Columbia and on March 6th, 1941, was classified 1-A by his Local Board. Within the required time thereafter he appealed to the District of Columbia Appeal Board, claiming to be a conscientious objector. His claim in this respect was transmitted to the Department of Justice, in accordance with regulations, and referred by the Department to Mr. E. Barrett Prettyman as hearing officer. In due time the latter, though recognizing that Giese was sincerely

[2] Quoted portions are taken verbatim from dissenting opinion of Chief Justice Groner of U. S. Court of Appeals for the District of Columbia (R. 26-27).

and aggressively opposed to war, recommended against allowance of the claim on the theory that Congress did not intend to authorize exemption unless—as was not true in Giese's case—the objection was based on religious training and belief. As the result, the Appeal Board affirmed the Local Board classification. Thereafter Giese, under Regulation 628.1, requested the Director of Selective Service for the District of Columbia to take an appeal to the President. This was allowed and resulted in the following order:

'Appeal No. 17448

Appeal to the President of the United States

'Under the Provisions of the Selective Service Regulations District of Columbia, Board of Appeal No. 1, Local Board No. 2, District of Columbia. Registrant: Willis Erle Giese. Order No. 398. Classification on Appeal to the President: Class 1-A.

'This, the 19th day of February, 1943.

'By Authority of the President.

'(S.) Lewis B. Hershey, Director.'

"Giese was notified of the President's classification on February 24, 1943, and on February 25th following was notified by Draft Board No. 2 to report for induction on March 10th. He refused to report and was indicted. On his trial, a jury being waived, General Hershey by stipulation of counsel testified that he was Director of Selective Service at the time of Giese's appeal to the President, and that he was at that time also an officer of the United States Army on active duty assigned to Selective Service; that the appeal was duly received and reviewed by six members of his staff, all of whom were officers of the Army or Navy, assigned by him as a Board of Review to consider Presidential appeals and to make recommendations to him concerning them; that upon receiving the report of the Board he considered the file and recommendation and, by authority of the President, acted thereon and as Director of Selective

Service signed the order on Giese's appeal • • •.

"Counsel for Giese thereupon moved the court to find him not guilty, upon the ground that the United States had failed to prove that he had violated any lawful order to report for induction. The ground of the motion was that the evidence showed that Giese was classified as 1-A by an agency of appeal not composed of civilians, in violation of the Selective Service Act, and hence that he had never been classified according to law, and consequently the order to report was without any foundation of support. The District Court overruled the motion and found Giese guilty."

The District Judge sentenced Giese to serve from three months to three years in the penitentiary. On appeal to the United States Court of Appeals for the District of Columbia the conviction was affirmed by a two-to-one decision, with Chief Justice D. Lawrence Groner dissenting.

Statute and Regulations Involved.

Applicable portions of the Selective Training and Service Act and regulations issued thereunder are set out in the appendix.

Specification of Errors to Be Urged.

1. The classification of petitioner on his Presidential appeal, upon which the order to report for induction was based, was null and void because it was rendered by an agency of appeal not composed of civilians, in direct violation of the Selective Training and Service Act.

2. Petitioner was not precluded by the Act, nor could he be precluded under the Fifth Amendment to the Constitution of the United States, from rasing point 1 as a defense to his indictment. The case of *Falbo* v. *United States*[3] is not applicable.

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[3] 320 U. S. 549.

Reasons for Granting the Writ.

1. The decision of the United States Court of Appeals for the District of Columbia in this case is in direct conflict with a decision of the Circuit Court of Appeals for the First Circuit in the case of *Chih Chung Tung* v. *United States*, rendered on May 24, 1944.[4]

The United States Court of Appeals for the District of Columbia, by its majority opinion, refused to consider petitioner's substantive defense in this case on the ground that petitioner was precluded from raising it by the decision of this Court in *Falbo* v. *United States* (*supra*). The Circuit Court of Appeals for the First Circuit has held on the contrary[5] that the *Falbo* case has no application in a comparable situation, where it is contended that the procedural requirements of the statute itself, which are conditions precedent to a valid classification of a registrant, have not been complied with.[6]

2. The United States Court of Appeals for the District of Columbia has failed to give proper effect to the following applicable decisions of this Court: *Falbo* v. *United States*, *supra*, *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Reference is made to the dissenting opinion of Chief Justice Groner (R. 27-29) for a full discussion of this point.

3. The United States Court of Appeals for the District of Columbia has refused to decide a question of substance properly presented to it, relating to the construction or application of the Fifth Amendment to the Constitution of the United States and of the Selective Training and

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[4] Not yet reported. Compare also Bagley v. United States, C. C. A. 9, decided June 14, 1944, and not yet reported.

[5] Chih Chung Tung v. United States, supra.

[6] See dissenting opinion of Chief Justice Groner (R. 29).

Service Act, and which question has not been, but should be, settled by this Court.

At his trial, and on appeal, petitioner contended in substance as follows:

Before a citizen may be punished for the crime of violating an order to report for induction issued by an executive officer or board, due process of law requires that the order be within the authority of the issuing officer.[7] The purported classification of petitioner on which he was ordered to report for induction was made *de novo* on his appeal to the President.[8] The classification order was issued by an "agency of appeal" created by the President to hear "appeals to the President" under the Selective Training and Service Act. The agency of appeal issuing this order was a military agency composed solely of military officials and not of civilians, which was in direct violation of the law. The petitioner, therefore, has not yet been classified under the law upon his appeal to the President, and that appeal may be said to be still pending. By regulation adopted under the statute a registrant may not be ordered to report for induction while his appeal to the President is pending, and any such order to report is ineffective and void.[9] Petitioner, therefore, has not violated any lawful order to report for induction under the Selective Training and Service Act, and his conviction, if sustained, would deprive him of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. The contention of petitioner set forth herein is fully supported by the dissenting opinion in the United States

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[7] Panama Refining Co. v. Ryan, 293 U. S. 388.

[8] Bowles v. United States, 319 U. S. 33.

[9] Regulations, Sec. 628.7 (see appendix).

Court of Appeals. Petitioner adopts the arguments set forth in that opinion as additional reasons for the granting of this writ.

WHEREFORE, petitioner respectfully prays that the writ of certiorari may issue.

EDMUND D. CAMPBELL,
Attorney for Petitioner.

DOUGLAS, OBEAR & CAMPBELL,
Of Counsel.

APPENDIX.

The following extracts from the Selective Training and Service Act of 1940 (50 U. S. C. A. Secs. 301-318) and from the regulations relating to Presidential appeals disclose fairly the legal points involved in this petition:

Act, Section 10(a).

"The President is authorized—

"(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

"(2) to create and establish a Selective Service System, * * * and * * * establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. * * * Appeal boards and agencies of appeal within the Selective Service System shall be composed of civilians who are citizens of the United States * * *;

"(3) to appoint by and with the advice and consent of the Senate * * * a Director of Selective Service who shall be directly responsible to him and to appoint and fix the compensation of such other officers, agents and employees as he may deem necessary to carry out the provisions of this Act; Provided, That any officer on the active or retired list of the Army, Navy, Marine Corps, or Coast Guard, or any reserve component thereof * * * who may be assigned or detailed to any office or position to carry out the provisions of this Act (except to offices or positions on local boards, appeal boards, or agencies of appeal, established or created pursuant to Section 10(a) (2) * * * may serve in and perform the functions of such office or position without loss of or prejudice to his status as such officer in the Army, Navy, Marine Corps, or Coast Guard or reserve component thereof * * *."

Regulations, Section 628.7:

"628.7 *Appeal to the President stays induction.* The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the President or during the time such an appeal is pending. Any such order to report for induction which has been issued shall be ineffective and shall be canceled by the local board."